Louisiana Law Review

Volume 65 | Number 1
Fall 2004

A Reason to Discriminate: Curtailing the Use of Title VII Analysis in Claims Arising Under the ADEA

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"There is . . . no harsher verdict in most men's lives than someone else's judgment that they are no longer worth their keep. It is then, when the answer at the hiring gate is 'You're too old,' that a man turns away . . . finding 'nothing to look forward to with pride, nothing to look forward to with hope.'"[1]

I. INTRODUCTION

During the 2003-2004 term, the United States Supreme Court decided that reverse age discrimination claims were not viable under the Age Discrimination in Employment Act (ADEA).[2] The ADEA was enacted in 1967 on the heels of the Civil Rights Act of 1964.[3] One of the reasons Congress enacted the ADEA was to promote the hiring of older persons within the workplace by prohibiting employers from terminating or refusing to hire a person solely based upon his or her old age.[4] Thus, the ADEA offers statutory protection to individuals forty years of age and older from employment discrimination based upon their age.[5]

In the late 1960s and 1970s, reverse discrimination claims began to appear as a result of the civil rights revolution.[6] Reverse

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1. This statement set the theme and tone of Secretary of Labor W. Willard Wirtz's report on the state of the older American worker in 1964. Inspired by the Civil Rights Act of 1964, Congress ordered the Secretary of Labor to conduct a study on the issues confronting older American workers. W. Willard Wirtz, The Older American Worker: Age Discrimination in Employment (Report) at 1 (Dep't of Labor 1965).

2. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 124 S. Ct. 1236 (2004).

3. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (2004)).

4. 29 U.S.C. § 621 (2004).

5. *See id.* § 631. Originally, the ADEA's protected class included individuals who were forty years old through and including individuals sixty-five years of age. Pub. L. No. 90-202 § 12, 81 Stat. 602, 607 (1967). In 1978, as a response to public opinion polls indicating strong sentiment against the mandatory retirement age of sixty-five, Congress increased the ADEA's upper age limit to seventy years of age. Pub. L. No. 95-256 § 12, 92 Stat. 189 (1978); Raymond F. Gregory, Age Discrimination in the American Workplace: Old at a Young Age 20 (2001). Once again, in 1986, due to the benefits that older, more experienced workers bring to the economy, Congress amended the ADEA's upper age limit by eliminating it altogether. Pub. L. No. 99-592 § 2(c)(1), 100 Stat. 3342 (1986) (codified at 29 U.S.C. § 631 (2004)); Gregory, *supra* note 5, at 20.

6. David Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 Wis.

discrimination occurs when employers adversely target employees, who are members of the traditionally accepted majority class, through discriminatory actions because of their majority status.[7] For instance, in *McDonald v. Santa Fe Trail Transportation Co.*[8] three employees were caught stealing from their employer's cargo.[9] The two plaintiffs, both Caucasian employees, sued their former employer for racial discrimination when they were terminated and an African-American employee, who had committed the same offense, was not discharged.[10] The Court, relying upon the Congressional intent underlying Title VII and Equal Employment Opportunity Commission interpretations of the statute, concluded that Title VII prohibits all discriminatory employment practices made on the basis of race.[11] Hence, the Court held that the plaintiff employees in *McDonald* had stated a cause of action.[12]

The *McDonald* decision has provided legal footing for plaintiffs in reverse discrimination claims to stand upon. In fact, it has been suggested that reverse discrimination claims are now "rampant" within our society.[13] According to the Equal Employment Opportunity Commission, the number of reverse discrimination claims filed by white employees nearly doubled from ten percent to approximately seventeen percent between 1991 and 1996.[14] It has also been suggested that with demographic changes in the American workforce contributing to more diverse workplaces, an increase in the number of reverse discrimination claims filed is highly probable.[15]

The purpose of this paper is to suggest that, despite their similarities, there are some significant differences between discrimination claims arising under Title VII and those arising

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L. Rev. 657, 662 (2000).

7. William D. Evans, Jr., *Reverse Discrimination Claims—Growing Like Kudzu*, 37 Md. B.J. 48, 48 (2004); Timothy K. Giordano, *Different Treatment for Non-minority Plaintiffs Under Title VII: A Call For Modification of the Background Circumstances Test to Ensure that Separate Is Equal*, 49 Emory L.J. 993, 993 (2000).

8. 427 U.S. 273, 96 S. Ct. 2574 (1976).

9. *Id.* at 275-76, 96 S. Ct. at 2576-77.

10. *Id.*

11. *Id.* at 279-80, 96 S. Ct. at 2578-79.

12. *Id.* at 280, 96 S. Ct. at 2579.

13. Evans, *supra* note 7; Giordano, *supra* note 7.

14. Ruth Larson, *Claims of Bias Rising in Agencies*, Wash. Times, Sept. 17, 1997, at A1.

15. Camille O. Olsen, Remarks at Meeting on Repositioning for New Realities: Securing EEOC's Continued Effectiveness before the United States Equal Employment Opportunity Comm'n, Sept. 8, 2003, Washington D.C., *available at* www.eeoc.gov/abouteeoc/meetings/9-8-03/index.html (last visited Jan. 3, 2005).

under the ADEA. Because of these differences, the Supreme Court correctly held that reverse age discrimination claims should not be permitted under the ADEA.

Initially, this paper provides the historical background and development of both the ADEA and Title VII. In Part II, *Hazen Paper Company v. Biggins*[16] is discussed for its significance as the first indication by the Supreme Court that ADEA claims differ from Title VII claims. More specifically, in *Hazen*, the Court implied that while disparate impact may be applicable under Title VII, it might not be suitable for the ADEA. Part III analyzes the Sixth Circuit Court of Appeals' analysis of *General Dynamics Land Systems, Inc. v. Cline*[17] and subsequently presents the United States Supreme Court's opinion on the case. The Sixth Circuit held that the ADEA provides a cause of action for employees within the protected class who allege claims of age discrimination against their employer because their employer treated older employees more favorably.[18] However, after granting certiorari, the Supreme Court reversed the Sixth Circuit's decision in *General Dynamics*, holding that reverse age discrimination claims are not viable under the ADEA.[19] In order to evaluate the propriety of the Supreme Court's holding, the ADEA is compared with the Americans with Disabilities Act (ADA)[20] because of analogous difficulties presented by the class of persons protected under each statute. In addition, two distinct discrimination theories, the formal equality theory and the protected class theory, will be explored to assess whether reverse age discrimination claims are plausible. This theoretical analysis will be used to buttress the Supreme Court's decision to reverse the Sixth Circuit's decision in *General Dynamics*, thereby prohibiting reverse age discrimination claims. Ultimately, this paper will conclude that the Supreme Court's decision was proper and has curtailed the future expansion of Title VII jurisprudence into the unique realm of age discrimination.

II. BACKGROUND: TITLE VII AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Impetus for Enacting the ADEA

Like most anti-discrimination statutes, the impetus for and the history of the ADEA can be traced to a single revolutionary

16. 507 U.S. 604, 113 S. Ct. 1701 (1993).
17. 296 F.3d. 466 (6th Cir. 2002), *rev'd*, Gen. Dynamics Land Sys., Inc.v. Cline, 540 U.S. 581, 124 S. Ct. 1236 (2004).
18. *Id.*
19. 540 U.S. 581, 124 S. Ct. 1236 (2004).
20. 42 U.S.C. §§ 12101-12213 (2004).

enactment: Title VII of the Civil Rights Act of 1964. Title VII served as the first federal legislation prohibiting discrimination in the hiring, firing, promoting, training, and compensating of employees for the reason of race, color, sex, national origin, or religion.[21] The legislative history indicates that Congress was particularly interested in eliminating the discriminatory treatment experienced by African-Americans.[22] Overall, however, Title VII served as the nation's first legislation requiring employers to make employment decisions about individuals strictly based upon their ability, as opposed to protected characteristics such as race or gender.[23]

Congress did not prohibit age discrimination in the Civil Rights Act of 1964 partly due to its "substantially different" nature when compared with those forms of discrimination covered under the Act.[24] Specifically, age discrimination, unlike discrimination based upon race, has not historically been animus based.[25]

In 1964, age discrimination in employment was not a new thing; stereotypical thinking about older persons, or ageism, had existed in the United States since at least the 1800s.[26] The Department of Labor report noted that employers held beliefs and misconceptions about

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21. *Id.* § 2000e-2 (2004).

22. H.R. Rep. No. 88-914 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391. The House Report stated, "[T]oday, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities, which are considered to be, and must be, the birthright of all citizens." Id., 1964 U.S.C.C.A.N. at 2393.

23. Maria A. Citeroni, Iadimarco v. Runyon *and Reverse Discrimination: Gaining Majority Support for the Majority Plaintiffs*, 48 Clev. St. L. Rev. 579, 582-83 (2000).

24. Nancy Lane, *After* Price Waterhouse *and the Civil Rights Act of 1991: Providing Attorney's Fees to Plaintiffs in Mixed Motive Age Discrimination Cases*, 3 Elder L.J. 341, 344 (1995).

25. *Id.* at 344 n.14. The author wishes to express that she has oversimplified the issue of race discrimination strictly for the ease of analysis. The author is aware of the highly complex nature of race discrimination. Animus-based actions and beliefs simply cannot explain the existence of race discrimination in modern-day society. Rather, race discrimination occurs because individuals have misconceptions and stereotypical beliefs about persons because of their race, color, language, culture, and ethnicity.

26. Ageism, a term credited to one of the nation's most notable gerontologists, Dr. Robert Butler, is a stereotypical way of thinking about the old. For instance, in the employment setting, an employer who has an ageist attitude believes that as a person ages, he or she becomes less productive or competent than a younger person, solely because of the employee's age. An employer with ageist beliefs may also think that as individuals age they lose their creative ability, become incapable of learning new things, and contest change and innovation. Gregory, *supra* note 5, at 23.

older workers being slower and less productive.[27] In the Department's study, employers indicated that older employees suffered from mental or physical deterioration at age forty-five making them unable to perform certain duties or job requirements.[28] In a capitalist society such as ours, being perceived as unproductive is the death knell in employment. The results of this study also indicated that not only were older Americans being forced into early retirement and replaced with younger workers,[29] but older workers were less likely to be hired than younger workers.[30] Many states at the time of the Department of Labor's report had legislation in effect aimed at eliminating age discrimination.[31] However, several states indicated that a federal law prohibiting age discrimination would enable states to better serve and protect the older employee through education and training.[32]

The Department's research concluded that age should not be associated with one's usefulness or ability in the workforce.[33] But, Secretary of Labor Wirtz recommended against extending anti-discrimination laws pertaining to racial or sex discrimination to age discrimination.[34] Wirtz recognized that age discrimination was substantially different from other forms of discrimination.[35] For instance, Wirtz explicitly stated that "[t]he gist of the matter is that 'discrimination' means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving—for example—race."[36] Historically, racial discrimination originated from feelings of dislike or animosity toward members of another group; whereas age discrimination is more frequently based on inaccurate assumptions and beliefs about an individual's abilities.[37]

In response to the Department's report, Congress enacted the ADEA in 1967.[38] The ADEA prohibits employers from using age as

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27. Wirtz, *supra* note 1, at 8.
28. W. Willard Wirtz, The Older American Worker: Age Discrimination in Employment (Research Materials) at 10 (Dep't of Labor 1965).
29. *Id.* at 27, 29-35.
30. *Id.* at 4-5.
31. The Department of Labor's report listed twenty-one states that had private employment discrimination laws in effect in 1965. The twenty-one states were as follows: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Indiana, Louisiana, Massachusetts, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Washington, and Wisconsin. *Id.* at 116.
32. *Id.* at 111.
33. Wirtz, *supra* note 1, at 21.
34. *Id.* at 2-3.
35. *Id.* at 5-6.
36. *Id.* at 2.
37. Lane, *supra* note 24, at 344 n.14.
38. *Id.* at 344.

an employment factor for hiring, firing, promoting, or demoting an individual in the workplace.[39] The purposes of the ADEA are to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."[40] Those initially protected by the ADEA were individuals aged forty to sixty-five.[41] But, in 1986, Congress removed the maximum age limitation which changed the age span of the ADEA's protected class to include anyone forty years of age or older.[42]

B. America's Aging Workforce

Because of the financial needs of older workers, the United States is facing the largest older workforce it has ever seen.[43] The nation's baby-boomers are grown up, living longer, and taking an active role in our nation's workforce.[44] In fact, by 2006, all of our nation's baby boomers will be within the ADEA's protected class.[45] The unstable economy has encouraged employers to be more efficient and resourceful with their employees, while remaining productive. As a result, downsizing and early retirement options are more commonplace.[46] Older workers are finding themselves the victims of such business practices.[47] Relying on the ADEA, older workers have

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39. 29 U.S.C. § 623 (2004).
40. *Id.* § 621.
41. Pub. L. 90-202 § 12 (1967).
42. 29 U.S.C. § 631 (2004) (enacted by Pub. L. No. 99-592 § 2(c)(1) (1986)).
43. Nancy R. Lockwood, *The Aging Workforce*, Human Resource Magazine, Dec. 1, 2003, at 1 (attributing financial needs and economics as the major reason why more older persons are working or seeking work).
44. Sara E. Rix, *Working Longer in the United States*, *at* http:www.jil.go.jp/seika/us.pdf (last visited Feb. 7, 2004); News Release, United States Dep't of Health and Human Servs., HHS Issues Report Showing Dramatic Improvements in American's Health Over Past 50 Years: Infant Mortality at Record Low, Life Expectancy at Record High (Sept. 12, 2002), *available at* http://www.hhs.gov/news/press/2002pres/20020912.html.
45. Gregory, *supra* note 5, at 1-2.
46. H. Lane Dennard, Jr. & Kendall L. Kelly, Price Waterhouse*: Alive and Well Under the Age Discrimination in Employment Act*, 51 Mercer L. Rev. 721, 723 (2000); *see generally*, Rix, *supra* note 44; News Release, *supra* note 44 (discussing association of high costs with older employees in the form of health care and professional training).
47. *See* News Release, The United States Equal Opportunity Employment Comm'n, Gulfstream Aerospace to Pay $2.1 Million For Age Bias in EEOC Settlement (Dec. 11, 2002), *available at* www.eeoc.gov/press/12-11-02.html (settlement reached between defendant and class of management level plaintiffs, forty years old and older, who were laid off or forced to retire during a reduction-in-force); *see also* News Release, The United States Equal Opportunity Employment

a resource to challenge any employment discharges or other adverse employment actions taken on account of their age.[48] In fiscal year 2002, the number of age discrimination claims filed with the Equal Employment Opportunity Commission reached 19,921, a two and one-tenth percent increase over the previous year.[49] As our society continues to age, we can only expect the number of ADEA claims to continue to escalate.

C. *Substantive Provisions of the ADEA*

As previously mentioned, the ADEA prohibits arbitrary discrimination against employees forty years old and older because of their age.[50] Under the ADEA employers are prohibited from terminating or refusing to hire an individual on the account of her age;[51] from treating any aspect of an individual's employment, such as compensation or terms of employment, differently on account of an individual's age;[52] from segregating an employee in such a way as to hinder her from being promoted or subjecting her to adverse treatment on account of her age;[53] or reducing an employee's wages in order to comply with the ADEA.[54] Employment agencies and labor organizations are subject to similar provisions under the ADEA.[55]

The ADEA also has some additional requirements that must be adhered to by employers. For instance, employers, employment agencies, and labor organizations may not retaliate against any employee who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation" under the ADEA.[56] Furthermore, employers may not print or publish any employment advertisement specifically limiting or discriminating against potential applicants on the basis of their age.[57] But, employers are required to post notices in visible locations at all times throughout

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Comm'n, EEOC Charges Sidley & Austin with Age Discrimination (Jan. 13, 2005), *available at* www.eeoc.gov/press/1-13-05.html (suit filed by EEOC alleging that defendant law firm violated the ADEA by forcing certain partners on account of their age to either leave the firm or retire).

48. Robert Coulson, Empowered at Forty 4 (1990).

49. United States Equal Employment Opportunity Comm'n, *Age Discrimination in Employment Act (ADEA) Charges FY 1992-FY 2004*, *at* http://www.eeoc.gov/stats/adea.html (last visited Feb. 14, 2005).

50. 29 U.S.C. § 623 (2004).

51. *Id.* § 623(a)(1).

52. *Id.* § 623(a)(2).

53. *Id.*

54. *Id.* § 623(a)(3).

55. *Id.* §§ 623(b), (c)(1)-(c)(3).

56. *Id.* § 623(d).

57. *Id.* § 623(e).

the employment setting that contain information about employees' rights under the ADEA, and how to proceed on such a claim.[58] And yet, despite all of the limitations the ADEA places upon employers, the ADEA does provide employers with some leeway when it comes to early retirement and health plans. Specifically, the ADEA does permit employers to offer employees voluntary, early retirement plans,[59] and to consider an employee's age when it is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business."[60]

An employee who wants to pursue an ADEA claim must first file a charge with the EEOC within 180 days after the discriminatory action occurs, unless she lives within a deferral state.[61] If an employee lives in a deferral state, a state that has its own age discrimination laws and has also authorized a state agency or authority to seek relief for such a claim, then she must file a charge with the EEOC within 300 days from the date on which the unlawful action occurred,[62] "or within 30 days after receipt by the individual of notice of termination proceedings under state law, whichever is earlier."[63] Under the ADEA an employee may seek civil penalties against his or her employer in the form of damages for back pay and equitable relief.[64] Furthermore, the ADEA prohibits employers from engaging in retaliatory action against an employee.[65]

D. Impact of Title VII on ADEA Claims

Title VII and the ADEA were both enacted to serve a similar function: to eradicate discrimination in the workplace.[66] Due to their similar statutory construction and purpose, courts have traditionally relied upon Title VII to serve as the guide or standard by which claims arising under the ADEA are analyzed.[67] For instance, in the

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58. *Id.* § 627.
59. *Id.* § 623(m).
60. *Id.* § 623(f)(1).
61. *Id.* § 626(d)(1).
62. *Id.* §§ 626(d)(2), 633(b).
63. *Id.* § 626(d)(2).
64. *Id.* § 626(b), (c)(1).
65. *Id.* § 623(d).
66. 42 U.S.C. § 2000e-2 (2004); 29 U.S.C. § 621 (2004).
67. Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog that Didn't Bark*, 39 Wayne L. Rev. 1093, 1096-97 (1993); *see also* Hase v. Missouri, 972 F.2d 893 (8th Cir. 1992); Coburn v. Pan Am. World Airways, Inc., 711 F.2d. 339 (D.C. Cir. 1983); Ragland v. Rock-Tenn Co., 955 F. Supp. 1009 (N.D. Ill. 1997) (aforementioned cases discuss applicability of McDonnell Douglas prima facie test used in Title VII cases to ADEA claims); *see also* Moss v. Detroit Edison Co. 149 F.3d 1184 (6th

past, the courts have applied both disparate treatment analysis and disparate impact analysis to ADEA claims, both of which were initially applied to Title VII claims.[68]

A plaintiff may allege disparate treatment, or intentional discrimination, under both the ADEA and Title VII.[69] The Supreme Court has described disparate treatment as "the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."[70] In order to prevail on a disparate treatment claim, discriminatory motive,[71] or intent, must be shown.[72] Discriminatory motive may be shown by the plaintiff in one of two ways: present direct evidence, such as an employer's discriminatory treatment of certain persons because of their race or sex, that facially demonstrates the prohibited discriminatory motive; or, present circumstantial evidence from which discriminatory motive may be inferred by the fact-finder through the *McDonnell Douglas* prima facie test.[73]

Under the *McDonnell Douglas* framework, the employee must first establish a prima facie case demonstrating that she was performing her work satisfactorily and that her employer took

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Cir. 1998); Hulsey v. Kmart, Inc. 43 F.3d. 555 (10th Cir. 1994); Hamilton v. 1st Source Bank, 928 F.2d 86 (4th Cir. 1990); Mogley v. Chicago Title Ins. Co., 719 F.2d 289 (8th Cir. 1983) (aforementioned cases apply the reasoning from *Delaware State College v. Ricks*, a Title VII case, to ADEA claims whereby statute of limitations begins to run from the day on which the adverse employment action occurs).

68. *See* W. VA. Univ./W. VA. Bd. of Regents v. Decker, 447 S.E.2d 259, 264 (W. Va. 1994) ("The Supreme Court has specifically declined to decide whether disparate impact theory is applicable to claims under the ADEA. However, the majority of circuit courts [1st , 6th, 7th, 10th] considering the issue have decided to apply disparate impact analysis to claims arising under the ADEA."); Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1428 (10th Cir. 1993) (assuming viability of disparate impact theory to ADEA claims); Rose v. Wells Fargo & Co., 902 F.2d. 1417, 1421 (9th Cir. 1990) (discussing applicability of both disparate treatment and disparate impact theories to the ADEA); Smith v. City of Des Moines, Iowa, 99 F.3d. 1466, 1470 (8th Cir. 1996)(discussing the application of disparate impact claims under the ADEA within the 8th Circuit post-*Hazen*).

69. H. Lane Dennard, Jr. & Kendall L. Kelly, Price Waterhouse: *Alive and Well Under the Age Discrimination in Employment Act*, 51 Mercer L. Rev. 721, 734 (2000).

70. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 1854 (1977).

71. Rebecca Hanner White, Employment Law and Employment Discrimination 77 (1998).

72. Dennard & Kelly, *supra* note 69, at 734.

73. White, *supra* note 71, at 78-79 (prima facie test was derived from the seminal case, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 98 S. Ct. 1817 (1973)).

discriminatory action against her. The significance of the *McDonnell Douglas* prima facie case is that "it creates a legally mandatory, rebuttable presumption of unlawful motive. If the defendant remains silent in the face of a prima facie case, the plaintiff wins."[74] Once a prima facie case has been established, the employer must "articulate some legitimate, nondiscriminatory reason" for its conduct (i.e., not hiring an African-American person for a job position because they were not qualified, as opposed to an illegitimate, reason: because of her race).[75] If the employer meets its burden, then the burden of production shifts back to the employee to prove by a preponderance of the evidence that the reason offered by her employer to explain its actions "was in fact pretext."[76]

Despite the availability of the *McDonnell Douglas* pretext requirement, in certain cases the fact-finder may find that both lawful and unlawful factors motivated an employer to make the challenged employment decision.[77] These cases are more commonly referred to as mixed-motive cases.[78] More often than not, mixed-motive cases only arise when a plaintiff provides direct evidence of the employer's discriminatory behavior; therefore, the *McDonnell Douglas* burden shifting analysis is inapplicable.[79]

The Supreme Court defined the mixed-motive analysis in the landmark case, *Price Waterhouse v. Hopkins*.[80] The *Price Waterhouse* proof structure requires a plaintiff alleging employment discrimination to provide direct evidence of an employer's reliance on discriminatory factors in making its employment decisions.[81] If

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74. *Id.* at 79.

75. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 98 S. Ct. 1817, 1824 (1973).

76. *Id.* at 804, 93 S. Ct. at 1825.

77. Dennard & Kelly, *supra* note 69, at 739; White, *supra* note 71, at 81.

78. *See* Dennard & Kelly, supra note 69, at 739.

79. White, *supra* note 71, at 82.

80. 490 U.S. 228, 109 S. Ct. 1775 (1989).

81. *Id.* at 243-46, 109 S. Ct. 1786-1789 (1989). However, the United States Supreme Court's 2003 decision, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148 (2003) has blurred the once distinctive line between the *McDonnell Douglas* pretext cases and the *Price Waterhouse* mixed-motive cases. According to *Costa*, a plaintiff alleging employment discrimination under Title VII no longer has to provide direct evidence of an employer's reliance on discriminatory factors in making its employment decisions. Rather an employee need only "present sufficient evidence for a reasonable jury to conclude by a preponderance of evidence that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'" *Costa*, 539 U.S. at 101, 123 S. Ct. at 2155. A glimpse of the far reaching impact of *Costa* may be seen in the recent Fifth Circuit Court of Appeals decision, *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305 (5th Cir. 2004). The court held, "*Desert Palace* modifies the *McDonnell Douglas* analysis in ADEA cases such that a plaintiff can proceed on a mixed-motives theory even

the plaintiff convinces a fact-finder that this evidence influenced the employment decision-making process, then the burden of proof, or persuasion rather, shifts to the employer.[82] The employer then needs to prove that the same employment decision would have been made without the influence of an improper, discriminatory motive.[83] If the employer satisfies this burden, then it will not be held liable.[84]

Another theory of discrimination under Title VII is the disparate impact theory of discrimination. Disparate impact theory occurs when a facially neutral employment practice adversely impacts one group more harshly than another and cannot be justified by a business need.[85] Unlike disparate treatment, a plaintiff need not prove any discriminatory motive when she alleges disparate impact.[86] The Supreme Court introduced disparate impact analysis in the seminal case of *Griggs v. Duke Power Co.*[87]

In *Griggs*, several African-American employees filed a class action discrimination suit against their employer under Title VII.[88] Prior to the enactment of Title VII, the defendant openly discriminated against African-American employees, whereby they were only employed in the company's Labor Department.[89] Employees who worked in the Labor Department, as opposed to the other departments, received the lowest salaries.[90] Subsequent to the

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without direct evidence of discrimination." *Rachid*, 376 F.3d at 316. Essentially, the *Rachid* court endorsed the application of post-*Costa* mixed-motive analysis under Title VII to ADEA claims. *Id.* at 312. According to the Fifth Circuit, this analysis represented a merging of the *McDonnell Douglas* and *Price Waterhouse* approaches, such that this new approach would be coined for simplicity, the "modified *McDonnell Douglas* approach." *Id.* Under the modified *McDonnell Douglas* approach, a plaintiff-employee alleging an ADEA claim must initially demonstrate that she has a prima facie case of discrimination. *Id.* Once this burden has been met, the employer must provide a legitimate and lawful reason for her questionable employment decision. *Id.* Next, the employee must either provide evidentiary support that her employer's reason is only pretext, *or* that although the employer's reason is true, it is not the only reason for her conduct, and that the plaintiff-employee's age served as another motivating factor of her employer's adverse conduct. *Id.* Finally, if the employee is able to prove that age was a motivating factor in the adverse employment decision, then her employer must demonstrate that it would have made the same adverse employment decision regardless of the discriminatory animus. *Id.*

82. *Price Waterhouse*, 490 U.S. at 230, 276-78, 109 S. Ct. at 1804-05 (O'Connor, J. concurring).

83. *Id.* at 258, 190 S. Ct. at 1795.

84. *Id.*

85. White, *supra* note 71, at 91.

86. *Id.*

87. 401 U.S. 424, 91 S. Ct. 849 (1971).

88. *Id.*

89. *Id.* at 426-27, 91 S. Ct. at 851.

90. *Id.*

enactment of Title VII, plaintiffs' employer instituted two mandatory requirements: in order for an employee in the Labor Department to receive a transfer, he had to have a high school degree, and to qualify for placement in all departments except for the Labor Department, an employee had to receive satisfactory scores on two standardized general intelligence tests.[91]

On appeal, the Fourth Circuit reasoned that "there was no showing of racial purpose or invidious intent in the adoption of the high school diploma requirement or general intelligence test and that these standards had been applied fairly to whites and Negroes alike."[92] Therefore, due to the absence of any discriminatory purpose, the Court of Appeals held that such requirements were permitted under the Title VII.[93] However, the Supreme Court reversed the Court of Appeals by looking to the purpose of Title VII: to achieve equality and to remove barriers that favored whites over nonwhites in the employment setting.[94] Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[95] However, the Court did acknowledge that Title VII did not prohibit employment testing which had a discriminatory effect *if* it was absolutely necessary for successful job performance.[96] The Supreme Court ultimately concluded that defendant's mandatory promotional requirements discriminated against the plaintiffs under Title VII because performance on such tests was not absolutely necessary for successful job performance, and because job preference and promotions within the defendant's company were preserved for Caucasians, as had been done in the past.[97]

Approximately twenty years after the *Griggs*' decision, Congress codified disparate impact in the Civil Rights Act of 1991.[98] Although the Civil Rights Act of 1991 explicitly stated that disparate impact applied in Title VII cases, the Act was mute as to whether disparate impact applied to the ADEA.[99] Despite the Act's silence, the courts continued to apply disparate treatment and disparate impact to age discrimination claims without hesitation. However, the Supreme Court sent a different message to the lower courts regarding whether

91. *Id.* at 427-28, 91 S. Ct at 851-52.
92. *Id.* at 429, 91 S. Ct. at 852.
93. *Id.*
94. *Id.* at 431, 91 S. Ct. at 853.
95. *Id.*
96. *Id.*
97. However, the Supreme Court did not prohibit the use of tests that had a discriminatory effect, as long as the tests were essential for the job position. *Id.* at 432, 91 S. Ct. at 854.
98. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).
99. *Id.*

disparate impact should be applied to age discrimination claims in its 1993 decision, *Hazen Paper Co. v. Biggins.*[100]

III. *HAZEN PAPER CO. V. BIGGINS*: THE SUPREME COURT'S FIRST INDICATION THAT ALL PRINCIPLES DEVELOPED UNDER TITLE VII MIGHT NOT APPLY UNDER THE ADEA

In *Hazen Paper Co. v. Biggins,*[101] the Supreme Court set the tone for evaluating ADEA claims differently from other employment discrimination claims under Title VII. In *Hazen*, the plaintiff, a sixty-two year old employee, claimed that his employer had fired him because of his age two weeks prior to his qualifying for a pension.[102] To receive a pension, Hazen Paper Company required each employee to work for the company for ten years.[103] The Court held that, although Hazen Paper Company had interfered with Biggin's ability to receive his pension benefits, this fact alone did not serve as an indication that the company had discriminated against Biggins because of his age.[104]

The Court began its analysis by evaluating the purpose of the ADEA.[105] *Hazen* recognized that Congress enacted the ADEA to protect older workers in both the hiring and firing processes from employers who hold misconceptions about older persons' abilities and productivity.[106] The Court noted that, unlike other forms of discrimination, age discrimination is not founded on animus based feelings toward older persons.[107] Rather, age discrimination occurs because employers rely on stereotypical beliefs that older persons are incapable of functioning within the workforce because of their age, instead of evaluating each individual's skill and abilities.[108] The stereotypical nature of age discrimination makes it unique among other forms of discrimination, such as race, which have historically been motivated by hate.[109]

The *Hazen* Court emphasized the fact that employers must evaluate employees solely upon their individual abilities and not upon

100. 507 U.S. 604, 113 S. Ct. 1701 (1993).
101. *Id.*
102. *Id.* at 606, 113 S. Ct. at 1704.
103. *Id.* at 607, 113 S. Ct. at 1704.
104. *Id.* at 613, 113 S. Ct. at 1707-08.
105. *Id.* at 610-11, 113 S. Ct. at 1706.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*; Lane, *supra* note 24, at 344 n.14 (discussing the difference between race discrimination and age discrimination, because the latter is not as emotionally charged); *see also supra* note 25 (author's comment).

their age.[110] But the Court acknowledged that as long as age is not the motivating factor in an employer's decision, then the problem of fostering ageist stereotypes disappears.[111] The Court noted that this reasoning holds true even when age is related to the motivating factor underlying the employment decision, such as the pension at issue in *Hazen*.[112] The Court recognized that more of the older employees at Hazen Paper Company were closer to reaching their ten years of service than the younger employees.[113] But, the Court reasoned that age was only correlated with the length of time required to receive a pension.[114] The Court stressed that the lower court's determination that age discrimination had occurred solely based upon the interference with Biggins' ability to receive his pension was an unsubstantiated assumption.[115] The Court added that "a decision by the company to fire an older employee solely because he has nine-plus years of service and therefore is 'close to vesting' would not constitute discriminatory treatment on the basis of age."[116] Furthermore, the Court indicated that unless an employer specifically uses a stereotype about older employees (i.e., that they are less productive), there has been no age discrimination in the workplace.[117] But, the Court stressed that an ADEA violation could be well-founded if facts revealed that Biggins' employers knew or showed reckless disregard for ensuring that their actions complied with the ADEA.[118] Therefore, the Court remanded the case and cautioned the lower court about equating an employee's vesting period with his or her age.[119]

The Supreme Court's decision in *Hazen* "threw into disarray the apparently settled rule that disparate impacts could violate the ADEA."[120] Although the Court concluded that disparate treatment violates the ADEA, it refused to decide whether employment actions

110. *Hazen*, 507 U.S. at 611, 113 S. Ct. at 1706.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 611-12, 113 S. Ct. at 1707.
116. *Id.* at 612, 113 S. Ct. at 1707.
117. *Id.* at 610, 113 S. Ct. at 1706.
118. *Id.* at 616, 113 S. Ct. at 1709. Please note that although this language appears to indicate that the Supreme Court in *Hazen* approved the application of disparate impact to ADEA cases, the Court did not definitively answer this question.
119. *Id.* at 614, 113 S. Ct. at 1708. On remand, Biggins lost his ADEA claim, but was able to prevail on his ERISA claim. Biggins v. Hazen Paper Co., 111 F.3d 205 (1st Cir. 1997).
120. Nathan E. Holmes, *The Age Discrimination in Employment Act of 1967: Are Disparate Impact Claims Available?*, 69 U. Cin. L. Rev. 299, 309 (2000).

resulting in disparate impact constitute age discrimination.[121] Due to the Court's lack of guidance, there is a circuit split among the lower courts regarding the applicability of the disparate impact theory to ADEA claims.[122]

The Court's failure to address the applicability of the disparate impact theory to ADEA claims may be due, in part, to how the ADEA's protected class is defined. Age is not an immutable characteristic; it is a characteristic that a person grows into later in life as opposed to a characteristic, such as race or gender, that a person is born with.[123] Inevitably, it is this factor that will cause every employee, if he or she lives long enough, to become an economic liability to his or her employer.[124] In essence, age discrimination differs from discrimination based upon race or sex, because age, the defining class factor, is a continuum.[125] As a continuum, age has presented the courts with a unique set of problems. In *Ellis v. United Airlines Incorporated,* the Tenth Circuit Court of Appeals summed up its apprehensiveness to extend the disparate impact theory to ADEA claims by stating, "[D]isparate impact age discrimination claims would create several practical problems . . . the line defining the class that is disparately impacted by a challenged policy is an imprecise one, which could be manipulated to either strengthen or

121. 507 U.S. 604, 113 S. Ct. 1701. *See generally* Roberta Sue Alexander, *The Future of Disparate Impact Analysis for Age Discrimination in a Post-*Hazen *Paper World,* 25 U. Dayton L. Rev. 75 (1999) (arguing that the courts should still be able to apply disparate impact to ADEA claims in order to further Congress' goal of eliminating age discrimination).

122. Some courts—including the United States Courts of Appeals for the First, Seventh, and Tenth Circuits—have opted to prohibit disparate impact claims, while others—including the United States Courts of Appeals for the Second, Eighth, and Ninth Circuits—relying on scholarly literature, have allowed disparate impact claims in ADEA cases. Other Circuits, such as the Eleventh Circuit, have yet to address the issue of disparate impact in ADEA cases, but appear to be leaning against allowing such claims. Holmes, *supra* note 120, at 311-17 (2000). In fact, only recently, the United States Court of Appeals for the Fifth Circuit held that disparate impact theory of liability is inapplicable to ADEA claims. Smith v. City of Jackson, Mississippi, 351 F.3d 183, 195 (5th Cir. 2003) ("We [the Fifth Circuit Court of Appeals] . . . follow the majority of circuit courts to have addressed this issue in holding that a disparate impact theory of liability is not cognizable under the ADEA."). However, the United States Supreme Court has granted certiorari to review the Fifth Circuit's decision in *Smith* and will ultimately decide whether disparate impact analysis is applicable to the ADEA. *Id., cert. granted,* 124 S. Ct. 1724 (2004).

123. Tracey A. Cullen, *Reverse Age Discrimination Suits and the Age Discrimination in Employment Act,* 18 St. John's J. Legal Comment. 271, 303-04 (2003).

124. Lane, *supra* note 24, at 106.

125. *Id.* Unlike the ADEA, Title VII's protected classes are defined by concrete and distinct characteristics which are readily identified.

weaken the impact of a policy on some age group."[126] Overall, the *Hazen* Court's opinion suggests that, despite their similar beginnings and purposes, Title VII and the ADEA are different: due to the unique composition of the ADEA's protected class, discrimination theories such as disparate impact are inapplicable to the ADEA, and yet remain applicable to Title VII claims.[127]

The Supreme Court's decision in *Hazen* also expressed for the first time that the ADEA and Title VII were motivated by different concerns.[128] Like Secretary of Labor Wirtz discussed in his report to Congress in 1964, the *Hazen* Court took notice of the fact that age discrimination, unlike other forms of discrimination, was not founded upon animus or hate-based feelings; rather, it arose generally from misconceptions that employers held about older employees' capabilities and productivity in the workplace.[129] Interestingly, the historical, motivating factor for age discrimination—misconceptions about one's capabilities in the workplace—parallels that of discrimination based upon physical and mental disabilities.[130]

In hindsight, the Court's ruling in *Hazen* served as the springboard from which other challenges would be made regarding the dissimilarities between Title VII and ADEA claims.[131] One of the recent and more controversial issues that may be attributed to *Hazen* is reverse age discrimination claims. This issue was presented to the Supreme Court in *General Dynamics Land Systems, Inc. v. Cline*.[132]

IV. *GENERAL DYNAMICS LAND SYSTEMS, INC. V. CLINE*

A. General Dynamics Land Systems, Inc. v. Cline—*Procedural Development*

In *General Dynamics Land Systems, Inc. v. Cline*,[133] a class of employees, aged forty through forty-nine, sued their employer on an age discrimination claim.[134] Through a collective bargaining

126. 73 F.3d. 999, 1009 (10th Cir. 1996).

127. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 113 S. Ct. 1701, 1706 (1993).

128. *Id.* at 610-11, 113 S. Ct. at 1706.

129. *Id.*; Wirtz, supra note 1, at 2, 5-6; see also infra note 254 (author's comments).

130. 42 U.S.C. § 12101(a)(7) (2004); H.R. Rep. No. 101-485(II) (1990).

131. In fact, three years after *Hazen*, the Supreme Court would have to consider whether the *McDonnell Douglas* proof scheme, as applied in Title VII claims, suited ADEA claims in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S. Ct. 1307 (1996).

132. 540 U.S. 581, 124 S. Ct. 1236 (2004).

133. *Id.*

134. *Id.*

agreement, the plaintiffs' employer had adjusted its employees' retirement health benefits, such that employees who had reached their fiftieth birthday by July 1, 1997, were able to receive their full employee health benefits after retirement; however, the employer eliminated health benefits for the remaining employees who had not attained fifty years of age or thirty years of employment with the company.[135] The plaintiffs, relying on the fact that they were within the protected class because of their ages (forty to forty-nine), claimed that they had been victims of age discrimination.[136] However, in its opinion, the district court classified and analyzed the plaintiffs' age discrimination claim as a "reverse" age discrimination claim.[137] Essentially, the issue before the district court was whether a reverse age discrimination claim was viable under the ADEA. In its analysis, the district court noted that no federal court had ever deemed reverse age discrimination claims to be viable.[138] Therefore, the district court dismissed the plaintiffs' suit because the action did not meet the ADEA's purpose, nor did the ADEA support reverse age discrimination claims.[139]

However, the United States Court of Appeals for the Sixth Circuit reversed.[140] The majority held that the employer's more favorable treatment of employees aged fifty years or older enabled the plaintiffs to bring an age discrimination suit under the ADEA.[141] The majority relied on a strict interpretation of the ADEA, specifically focusing on the word "individual."[142] The majority reasoned that the ADEA and the Congressional purpose behind the ADEA offered protection to any *individual* age forty years and older from discriminatory treatment on the basis of his or her age. The majority also discounted the use of the term "reverse discrimination," insisting that an action is either discriminatory or it is not.[143] Ultimately, the court held that, because the plaintiffs were within the ADEA's protected class when they were denied an employment benefit solely on the basis of their age, they had a valid age discrimination claim.[144] The majority reversed the lower court's ruling which had dismissed plaintiffs' suit.[145]

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135. Cline v. Gen. Dynamics Land Sys., 296 F.3d 466, 466-68 (6th Cir. 2002).
136. *Gen. Dynamics v. Cline*, 540 U.S. at 124 S. Ct. at 1237.
137. Cline v. Gen. Dynamics Land Sys., 98 F. Supp. 2d 848 (N.D. Ohio 2000).
138. *Id.*
139. *Id.*
140. Cline v. Gen. Dynamics Land Sys., 296 F.3d 466, 472 (6th Cir. 2002).
141. *Id.* at 469-70.
142. *Id.*
143. *Id.* at 471 ("Moreover, we do not share the commonly held belief that this situation is one of so-called 'reverse discrimination.' . . . [T]he expression 'reverse discrimination' has no ascertainable meaning in the law.").
144. *Id.* at 472.
145. *Id.*

The dissent criticized the majority for allowing the plaintiffs to bring their claim, whether it be called a "reverse age discrimination" claim or not.[146] The dissent relied heavily on other circuits' opinions regarding "reverse age discrimination," particularly *Hamilton v. Caterpillar, Inc.*[147] In *Hamilton*, the Seventh Circuit stressed the uniqueness of age discrimination distinguishing age from other forms of discrimination. Specifically, the court observed that age, unlike race or gender, does not arise at birth and is not an immutable characteristic.[148] Relying on the *Hamilton* court, the dissent reasoned that Congress did not enact the ADEA to protect the young against the older; nor did the court believe that the ADEA offered any protection to the "younger old" against the "older old."[149] Overall, the *General Dynamics* dissent concluded that the Congressional purpose of the ADEA was to protect the older person in the workforce, not the younger.[150]

The United States Supreme Court, however, granted certiorari to review the Sixth Circuit's decision in *General Dynamics*.[151] Ultimately, the Court held that reverse age discrimination claims are not permissible under the ADEA, thereby reversing the Sixth Circuit's decision.[152]

B. Taking a Closer Look at the United States Supreme Court's Opinion in General Dynamics

1. The Supreme Court's Majority Opinion

The United States Supreme Court's majority opinion, much like the Sixth Circuit's dissent, relied heavily on the Congressional history and development of the ADEA in reaching its decision. Initially the Supreme Court's majority opinion addressed the significance of

146. *Id.* at 476 (Williams, J. dissenting).
147. *Id.* (citing Hamilton v. Caterpillar, Inc., 966 F.2d 1226 (7th Cir. 1992)).
148. *Hamilton*, 966 F. 2d, at 1227.
149. *Cline v. Gen. Dynamics*, 296 F.3d at 476.
150. *Id.*
151. Gen. Dynamics Land Sys., Inc. v. Cline, 538 U.S. 976, 123 S. Ct. 1786 (2003).
152. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 124 S. Ct. 1236 (2004). However, it is important to note that reverse age discrimination claims may not be impossible following the *General Dynamics* decision on the state level. If states enact legislation that broadly defines "age," or lowers the age limit of the protected class, then reverse age discrimination claims may remain a viable legal alternative at the state level. *See* Rebecca L. Ennis, General Dynamics Land Systems, Inc. v. Cline*: Shrinking the Realm of Possibility for Reverse Age Discrimination Suits*, 39 U. Rich. L. Rev. 753, 768 (discussing a Michigan law that defines age as "chronological age" and Oregon's age discrimination laws that offer coverage to persons eighteen years old and older).

Congress' decision not to incorporate the ADEA into Title VII.[153] Instead, Congress had instructed the Secretary of Labor to assess the prevalence of age discrimination within the workplace.[154] The Secretary compiled his findings into a report which revealed not only that "age was a serious problem, but one different in kind from discrimination on account of race."[155] The majority also reviewed Congressional testimony regarding age discrimination which focused on the "unjustified assumptions about the effect of age on ability to work."[156]

Overall, the majority stressed the fact that in all of the Congressional material it had reviewed, it found nothing that suggested that "any workers were registering complaints about discrimination in favor of their seniors."[157] Relying upon the ADEA's legislative history the majority concluded that "beyond reasonable doubt, [that] the ADEA was concerned to protect a relatively old worker from discrimination that works to the advantage of the relatively young."[158] Furthermore, the majority noted that although it had not decided any previous cases addressing the same issue of reverse age discrimination, all of the ADEA cases it had handled in the past showed the Court's "consistent understanding that the text, structure, and history point to the ADEA as a remedy for unfair preference based on relative youth, leaving complaints of the relatively young outside the statutory concern."[159] Through the Court's reasoning, it ultimately concluded that reverse age discrimination claims are implausible under the ADEA framework.

2. The Supreme Court's Dissenting Opinions

a. Justice Scalia's Dissent

Justice Scalia offered one of the two dissenting opinions in *General Dynamics*. In his dissent, Justice Scalia deferred to the Equal Employment Opportunity Commission's regulation which interpreted title 29, section 628 of the ADEA. Specifically, the EEOC's regulation stated as follows:

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153. *Gen Dynamics*, 540 U.S. at 587, 124 S. Ct. at 1240.
154. *Id.*
155. *Id.*
156. *Id.* at 588, 124 S. Ct. at 1241.
157. *Id.* at 589, 124 S. Ct. at 1242. Interestingly, the Court further noted that respondent Cline had failed to provide the Court with any Congressional reports or findings to suggest that workers were filing complaints because their employers were treating older employees more favorably.
158. *Id.* at 590-91, 124 S. Ct. at 1243.
159. *Id.* at 582, 593-94, 124 S. Ct. at 1238, 1244.

> It is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over. Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor.[160]

Justice Scalia criticized the Court for discounting the EEOC's interpretation of the ADEA, thereby asserting that the EEOC's interpretation was "entirely reasonable."[161] Justice Scalia summed up his dissent by simply stating that he would defer to the agency's (EEOC) "authoritative conclusion."[162]

b. Justice Thomas' Dissent

Justice Thomas authored the other dissenting opinion in *General Dynamics*.[163] Justice Thomas criticized the majority for analyzing the ADEA through a "social history" analysis, instead of relying upon the strict, textual reading of the statute.[164] Relying upon the strict interpretation of the ADEA, Justice Thomas believed that the plaintiffs had a valid claim under the ADEA: "[t]he plain language of the ADEA clearly allows for suits brought by the relatively young when discriminated against in favor of the relatively old."[165]

Justice Thomas also argued that the majority was misguided in its suggestion that the ADEA was enacted *only* to protect the older employee over the younger-old employee.[166] In making his argument, Thomas compared the ADEA to Title VII.[167] The Justice stated that clearly the momentum behind the enactment of Title VII of the Civil Rights Act was to offer protections strictly to racial minorities, with a specific emphasis on black persons.[168] Furthermore he noted that there was "no record evidence 'that [white] workers were suffering at the expense of [racial minorities]' and in 1964, discrimination against whites in favor of racial minorities was hardly 'a social problem requir[ing] a federal statute

160. *Id.* at 601, 124 S. Ct. at 1249 (citing 29 C.F.R. § 1625.2(a) (2003)).
161. *Id.* at 602, 124 S. Ct. at 1249.
162. *Id.*
163. *Id.* Justice Kennedy joined Justice Thomas in his dissenting opinion.
164. *Id.* at 602-03, 124 S. Ct. at 1249-50.
165. *Id.* at 603, 124 S. Ct. at 1250.
166. *Id.* at 607-08, 124 S. Ct. at 1252-53.
167. *Id.* at 608, 124 S. Ct. at 1253.
168. *Id.*

to place a [white] worker in parity with [racial minorities].'"[169] Hence, Justice Thomas suggested that under the majority's analysis of the ADEA, the Court "has been treading down the wrong path with respect to Title VII since at least 1976."[170] It was in 1976 when the Supreme Court held in *McDonald v. Santa Fe Trail Transportation Co.* that Title VII offers protections to all persons, and is not limited in application to members of one particular race over another.[171]

Overall, Justice Thomas contended that, unlike the majority opinion, age discrimination under the ADEA should be treated in the same fashion as race under Title VII: "namely, . . . that age discrimination cuts both ways and a relatively younger individual could sue when discriminated against."[172]

c. The Majority Opinion's Use of the Protected Class or Antisubordination Theory of Discrimination

1. Antisubordination Theory of Discrimination

The Supreme Court's majority opinion in *General Dynamics* utilized the protected class or antisubordination theory of discrimination in assessing whether a reverse age discrimination claim was viable under the ADEA.[173] The protected class theory of discrimination relies on a "holistic" approach to statutory interpretation.[174] A protected class theorist takes into account the historical and real life conditions that have led to the creation of antidiscrimination statutes.[175] The protected class theory of discrimination condemns certain practices not because they are unfair, but because they promote subordination of the group in which the individual who is excluded or ostracized is a member.[176] For example, a protected class theorist would consider the need to overcome male dominance within society when determining whether or not a sex discrimination claim is viable under Title VII.

169. *Id.* at 611, 124 S. Ct. at 1254.
170. *Id.*
171. 427 U.S. 273, 280, 96 S. Ct. 2574, 2579 (1976).
172. *Gen. Dynamics*, 540 U.S. at 612, 124 S. Ct. at 1255 (2004).
173. *Id.*, 124 S. Ct. 1236 (majority opinion); Owen Fiss, *Another Equality*, Issues in Legal Scholarship (2004), *available* at http://www.bepress.com/ils/iss2/art20 (last visited Jan. 19, 2005) (commenting that the antisubordination theory has also been referred to as the "group-disadvantaging principle . . . anticaste, antisubjugation . . . principle").
174. David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. Pa. L. Rev. 1697, 1778 (2002).
175. *Id.* at 1776.
176. Fiss, *supra* note 173, at 3-4.

As Professor David Schwartz notes, the protected class or antisubordination theory helps to provide answers for many of the questions created by antidiscrimination law, because antisubordination theorists have helped to "wage the moral battle for proper understanding of antidiscrimination law."[177] For instance, this theory helps to explain why equating race with low educational achievement or dangerousness, as in racial profiling, no matter how statistically accurate, is prohibited.[178] It has also been used to explain that the real purpose of affirmative action is not to create a more diverse academic environment, although this may be an indirect effect.[179] Rather, to an antisubordination theorist, the main purpose of affirmative action is to end the subordination of historically disadvantaged groups by giving them access to, and control of, larger shares of power that, otherwise, they might not receive.[180] Critical race theorists have coined this effect of affirmative action "racial dehierarchalization."[181] However, formal equality theorists are quick to criticize that such practices, like affirmative action, only enable "anti-discrimination law to discriminate."[182]

The protected class or antisubordination theory of discrimination has also been applied in the employment setting. For example, employers have been encouraged to create new testing devices to evaluate potential applicants.[183] These "newer" tests guarantee that minorities are not excluded from employment opportunities.[184] However, one of the major criticisms in this area is that such practices compromise productive efficiency in a way in which formal equality theory does not.[185]

Other criticism of the protected class or antisubordination theory is directed at Constitutional protections. Some critics argue against these theories because protection of groups is inconsistent with the Constitutional protections of "individuals" or "persons."[186] However, such attacks have been rebuffed by protected class theorists as being "without basis."[187] Even the most adamant individualist theorist

177. Schwartz, *supra* note 174, at 1779.
178. Fiss, *supra* note 173, at 4.
179. *Id.* at 6-7 (Fiss notes that others denote this as "the eradication of the caste.").
180. *Id.* at 7.
181. *Id.*
182. William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 Brook. L. Rev. 91, 141 (2003).
183. Fiss, *supra* note 173, at 8.
184. *Id.*
185. *Id.*
186. *Id.* at 19.
187. *Id.*

understands that individuals are not solely judged by their own accomplishments and contributions to society; rather, individuals are inevitably judged by their class membership.[188] The protected class theory is best fit to address this problem because it acknowledges that subordination exists within society, and it evaluates the historical, social boundaries that have hindered, and continue to hinder, minority group advancement.[189]

2. Antisubordination Theory Exemplified by the Majority Opinion

The protected class theory of discrimination undergirds the Court's majority opinion as exemplified by their concerns about attaining, and then maintaining equal treatment for persons within a subordinate class—the older class of workers, age forty years and older. Hence, relying on the components which comprise the protected class theory of discrimination, the Supreme Court concluded through reflection of the "social history," Congressional intent, and legislative history that the ADEA precluded all reverse age discrimination claims, thereby resulting in the reversal of the Sixth Circuit's decision in *General Dynamics*.[190]

The majority used the Secretary of Labor's report from 1967 and the Congressional hearings regarding the implementation of the ADEA to assess historical and societal impetus for enacting the ADEA. Evaluations of these sources led the Court to the conclusion that arbitrary age discrimination was prevalent and required legislative action in order to be remedied.[191] The majority stressed the fact that the Secretary's report revealed the prevalent subordination of older workers in the workforce, such that "the report contains no suggestion that reactions to age level off at some point, and it was devoid of any indication that the Secretary had noticed unfair advantages accruing to older employees at the expense of their juniors."[192]

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188. *Id.*

189. However, it should be noted that some proponents of the protected class or antisubordination theory argue that, currently, such theories are still not developed enough to address the complexity of subordination. These theorists advocate for a more multidimensional antisubordination theory because the intersectionality of several factors, such as race, gender, ethnicity, and sexual orientation, contribute to the subordination of groups of persons. *See* Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination,"* 6 Mich. J. Race & L. 285 (2001).

190. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600, 124 S. Ct. 1236, 1248 (2004).

191. *Id.* at 587, 124 S. Ct. at 1241.

192. *Id.*

The Court also evaluated the Congressional testimony that was given in preparing the legislative proposal to address the problem of age discrimination. The testimony "dwelled on unjustified assumptions about the effect of age on ability to work."[193] Specifically, the testimony focused on older workers who were not hired, despite their qualifications, because of an employer's arbitrary assessment of the individual as being too old.[194] The Congressional record contained ample documents which reflected the common societal consensus, that over time, as one ages, getting hired becomes more difficult, and when there is a choice to be made between a younger and an older individual for a job position, the younger individual will have the upper hand because she will not be "tagged with demeaning stereotype[s]."[195] The majority also emphasized that the Congressional hearings suggested that older persons received unfair treatment due to their higher benefit and pension costs to employers.[196]

Furthermore, the majority touched upon the fact that had Congress been concerned about protecting younger persons against the older, it would not have set an age minimum of forty, thereby ignoring all persons younger than forty.[197] And although the Court did recognize that all persons might be discriminated against because of their age, it concluded that age discrimination at forty years old and older is much different than discrimination against a teenager where "[t]he youthful deficiencies of inexperience and unsteadiness invite stereotypical and discriminatory thinking about those a lot younger than 40."[198] Sadly, the Court acknowledged that the prejudice a forty year old experiences is not based upon her youth: "The enemy of 40 is 30, not 50."[199]

Overall, by relying on the protected class theory of discrimination through the use of legislative history and Congressional findings, the *General Dynamics* Court concluded, "beyond reasonable doubt," that the ADEA was enacted to protect the relatively older worker from discrimination that gives the relatively younger worker an unfair advantage within the workplace.[200]

193. *Id.* at 588, 124 S. Ct. at 1241.
194. *Id.*
195. *Id.* at 589, 124 S. Ct. at 1242.
196. *Id.*
197. *Id.* at 591, 124 S. Ct. at 1243.
198. *Id.*
199. *Id.*
200. *Id.* at 590-91, 124 S. Ct. at 1243.

d. Justice Thomas' Dissenting Opinion and His Use of the Formal Equality Theory of Discrimination

1. Formal Equality Theory of Discrimination

Justice Thomas' dissenting opinion in *General Dynamics* appealed to the formal equality theory of discrimination.[201] Formal equality theory, or the status neutral theory, dictates that antidiscrimination law covered by Title VII is "colorblind."[202] Formal equality theory advocates that the purpose of antidiscrimination law is to eliminate the consideration of all discriminatory factors, such as race or gender, in making employment decisions.[203] Essentially, the formal equality theory prohibits the preferential treatment of any group of persons, such as women or minorities, regardless of how employers have treated them in the past.[204] Overall, it cannot be denied that formal equality theory has diminished inequality among some oppressed groups within our culture; however, it has not completely eradicated the problem.[205]

Basically, when deciding whether a person should be hired under the formal equality theory, an employer will not take any protected characteristics into account.[206] For instance, under Title VII, an employer may not discriminate against another based upon his or her race.[207] Therefore, an employer must not take race into account when making a hiring decision.[208] For the employer to hire an African-American over a white employee, when both are equally qualified, simply because the company lacks diversity, would constitute racism under Title VII for a formal equality theorist. In the eyes of a formal equality theorist, discrimination against white males is just as wrong as discrimination against historically disadvantaged minorities.[209]

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201. *Id.* at 602, 124 S. Ct. at 1249.

202. Schwartz, *supra* note 174, at 1775; Corbett, *supra* note 182, at 141; Nan D. Hunter, *Panel VI: Fighting Gender and Sexual Orientation Harassment–The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & Pol'y 397, 401 (2001) (describing formal equality theory as the "old, boring version of civil rights law"); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 Cal. L. Rev. 1279, 1292 (1987) (assimilation and androgyny are recognized as two models of formal equality theory).

203. Schwartz, *supra* note 174, at 1776.

204. Corbett, *supra* note 182, at 141.

205. Darren Lenard Hutchinson, *Factless Jurisprudence*, 34 Colum. Hum. Rts. L. Rev. 615, 624 (2003).

206. Schwartz, *supra* note 174, at 1776-77.

207. 42 U.S.C. § 2000e-2 (2004).

208. Schwartz, *supra* note 174, at 1775-76.

209. Schwartz, *supra* note 6, at 658.

Formal equality theory is problematic because it advocates the concept of fairness by relying upon the belief that similar cases should be treated alike.[210] Although this may sound acceptable and even equitable, in application the formal equality theory limits social progress by preserving the white, male dominated caste system.[211] For instance, early feminists, such as Ruth Bader Ginsberg, initially formulated their arguments for equal treatment of the sexes based on the formal equality theory; yet, over time, feminist theorists have abandoned and heavily criticized this theory as being inadequate and unjust.[212] A formal equality theorist minimizes differences between the sexes and sees no need for differential treatment under the law and public policy.[213] And yet, although formal equality theory enables women to compete with men for the same employment positions, it fails miserably in helping women combine a professional life with being the primary caretakers of their children.[214]

The formal equality theory's viewpoint is one lacking any real-world societal influence and any historical perspective regarding what types of discrimination led to the enactment of corrective legislation; therefore, no color is added to the situation in order to determine whether or not a discriminatory activity has occurred.[215] Simply put, a formal equality theorist's viewpoint is best described as being black and white. In *General Dynamics* Justice Thomas'

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210. *See* Hutchinson, *supra* note 205, at 625-26 (criticizing courts for taking ahistorical approaches to discrimination claims, particularly race discrimination claims).

211. Schwartz, *supra* note 174, at 1777; *see generally* Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 Stan. L. Rev. 1133 (1993) (criticizing formal equality theory because it is unable to remedy most forms of racism and reinforces a social hierarchy).

212. Hunter, *supra* note 202, at 403; Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 Wm. & Mary L. Rev. 209, 257, 259-72 (1998).

213. Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J.L. Reform 13, 25 (2001).

214. Becker, *supra* note 212, at 256-59 (addressing feminist arguments about the formal equality theory's inability to adapt new rules to accommodate women's changing lifestyles as well as their male counterparts); *see generally* Peggie R. Smith, *Parental-status Employment Discrimination: A Wrong in Need of a Right?* 35 U. Mich. J.L. Reform 569 (2002) (arguing against applying formal equality theory to parental-status discrimination because it does not take social and biological factors into account, nor does it accommodate working parents); *see also* Dana Page, *D.C.F.D.: An Equal Opportunity Employer—As Long As You Are Not Pregnant*, 24 Women's Rts. L. Rep. 9, 14 (2002) (discussing the Pregnancy Discrimination Act and how formal equality has "made it difficult for women to gain workplace accommodations for their culturally based caregiving responsibilities").

215. Schwartz, *supra* note 174, at 1776.

dissenting opinion exemplifies the formal equality theory of discrimination within the context of the ADEA.[216]

2. Formal Equality Theory Exemplified by Justice Thomas' Dissent

Justice Thomas began his dissent by stating that, "[T]his should have been an easy case."[217] Had the majority accepted Justice Thomas' interpretation of the ADEA under the formal equality theory, then *General Dynamics* could have been quickly and "easily" resolved in Thomas' favor. Justice Thomas' adherence to a strict, textual interpretation of the ADEA, led him to conclude that the plaintiffs in *General Dynamics* did have a claim solely because they were discriminated against because of their age.[218] For Justice Thomas, the plain meaning of the statute controls whether an individual may bring forth a discrimination claim, not the social history as was advocated by the majority;[219] Thomas' strict adherence to the statutory text exemplifies the essence of the formal equality theory. With that, Justice Thomas reviewed and deemed the ADEA to be clear upon its face.

Justice Thomas criticized the majority for adhering to the "social history" of the ADEA, a "new tool of statutory interpretation" within their opinion.[220] Thomas also criticized the majority for interpreting the Congressional purpose for enacting the ADEA as encompassing only the *most* prevalent form of discrimination, which in *General Dynamics* would have been strictly limited to the discrimination of older persons in favor of younger persons, thereby eliminating the discrimination of younger persons in favor of older persons.[221] Instead, Justice Thomas argued, consistent with the formal equality theory of discrimination, that all persons deserved to be equally protected under the ADEA and no one, regardless of their old age or their youth, should be left without such protection.[222]

Justice Thomas' analysis of relying on a strict textual application of the ADEA, whereby he dismissed the importance of assessing the social history encompassing the ADEA's enactment, is not an unusual or uncommon approach taken by those who serve as justices on the

216. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 602, 124 S. Ct. 1236, 1249 (2004).
217. *Id.*
218. *Id.* at 602-03, 124 S. Ct. at 1249-50.
219. *Id.* at 602, 124 S. Ct. at 1249-50.
220. *Id.*
221. *Id.* at 608, 124 S. Ct. at 1253.
222. *Id.* at 613, 124 S. Ct. at 1256.

bench.[223] In fact, Professor David Schwartz has suggested that the formal equality theory of discrimination "appeals to the judicial mind" for this very reason.[224] Judicial affinity for the formal equality theory of discrimination is derived from the fact that it is simpler to comprehend than the antisubordination theory as most judges are not "accomplished feminist thinkers," or educated and experienced in the like.[225] But more importantly, the formal equality theory of discrimination is favored by judges because it enables them to make quick, and more importantly, neutral decisions regarding the applicability of a statute to a particular scenario,[226] by narrowly focusing on the statutory text, thereby avoiding any need for fact intensive inquiries into motivation in discrimination cases.[227] Thus, when confronted by a statute such as the ADEA, under the formal equality theory the issue before the court will simply be whether or not members of the protected class have been discriminated against based upon their age. Clearly Justice Thomas implored the formal equality theory of discrimination in his dissent, thus enabling him to conclude that the plaintiffs in *General Dynamics* had a valid claim of reverse age discrimination under of the ADEA.

e. Final Thoughts on the Protected Class and Antisubordination Theory of Discrimination

Despite the theoretical debate among proponents of the formal equality theory of discrimination and the protected class theory of discrimination, one common factor holds true: while both of these theories may be able to operate within the Title VII framework, the same is not true for the ADEA. More precisely, it might be argued that the formal equality theory may not adequately function within the ADEA framework.

One can support the argument that formal equality theory functions in Title VII claims. This may be attributable to the very nature of Title VII's protected class categories, which are distinct and relatively clear-cut. For instance, each class of persons protected under Title VII is readily identified with a specific gender and racial class. When an employer hires or promotes an individual solely based upon the applicant's gender, for example, regardless of whether it prefers males or females, the employer is discriminating on the

223. Schwartz, *supra* note 174, at 1778.
224. *Id.; see, e.g.*, Brake, *supra* note 213, at 24; Corbett, *supra* note 182, at 141-42 (discussing the fact that formal equality is the dominant theory in discrimination case law).
225. Schwartz, *supra* note 174, at 1777.
226. *Id.* at 1778.
227. *Id.* at 1777.

basis of sex. Under the formal equality theory, regardless of which gender is being preferred, discrimination based on an employee's sex is occurring; therefore, the employer has clearly violated Title VII.[228] However, the application of formal equality theory in situations where the protected class lacks a group identity is more problematic. Such a situation arises in claims brought under the ADEA and the Americans with Disabilities Act (ADA).[229]

Age and disability, unlike gender and race, are not black or white variables. Age, like disability, encompasses a whole spectrum of issues. Although all persons age on a yearly basis, only those individuals forty years and older are statutorily protected from age discrimination.[230] However, this factor alone does not clearly indicate any commonalities that members of its protected class possess. Individuals protected by the ADEA, like those protected under the ADA, do not necessarily share any other attributes with persons who are within their respective protected classes.

In essence, unlike Title VII, individuals protected under the ADEA and the ADA have difficulty forming a group identity. For example, although a forty year old and a seventy year old employee are both protected by the ADEA, aside from meeting the statutory age requirement triggering the ADEA's protections, it is difficult to comprehend what other similarities they might share that would logically lead them to be grouped together in the same protected class. The ADA operates in a similar way. The ADA offers protection to all individuals who are discriminated against based upon their physical or mental disabilities.[231] Under the ADA, the disabilities of one individual within the protected class may be as discreet as dyslexia, but for another person the disability may be as conspicuous as confinement to a wheelchair for mobility. Aside from the fact that these two individuals each have a disability, they may share no other common characteristic.

This lack of a group identity makes the application of formal equality theory to the ADEA and ADA almost nonsensical. Whereas the formal equality theory can be argued as providing just results by eliminating discrimination based upon race or gender in Title VII claims, what justice will be served by permitting a reverse discrimination claim under the ADA for a person without a disability?[232] While advocates of the formal equality theory may suggest that racial discrimination against white males is no less evil

228. *Id.* at 1777-78.
229. 42 U.S.C. §§ 12101-12213 (2004).
230. 29 U.S.C. § 631 (2004).
231. 42 U.S.C. §§ 12101-12213 (2004).
232. Schwartz, *supra* note 174, at 1777 (discussing "just" outcomes in sex discrimination claims).

than discrimination against women or minorities, the same cannot be said for age and disability.[233] As previously addressed, the very nature of the class makes it difficult to argue that the formal equality theory of discrimination can apply to both the ADEA and the ADA. Congress wanted to protect a certain class of persons by enacting the ADEA and the ADA and the terms used to classify these groups are noninclusive. In other words, "age" does not mean that younger persons are protected by the ADEA, and "disabled" does not mean that those without a disability are covered by the ADA. Therefore, it is necessary for courts and legal professionals to utilize the protected class theory of discrimination when confronted with reverse age and disability claims.

The protected class theory, which the majority of the Supreme Court ultimately relied upon, allows courts to take into account the historical and contemporary societal purpose for which an Act, such as the ADEA or the ADA, was adopted.[234] The social setting and purpose of the ADEA provides the necessary weight to support age discrimination claims being evaluated by a protected class theory of discrimination. Congress enacted the ADEA to alleviate the discriminatory hardships that persons forty years old and older were encountering within the workplace.[235] A reverse age discrimination claim, when considered in light of the ADEA's purpose, is simply not feasible.[236] The younger employee in society was not the person whom Congress had concerns about finding and retaining employment.

A similar argument may be made for applying the protected class theory of discrimination to ADA claims. The ADA was enacted to provide persons with disabilities the same opportunities in employment as those without disabilities.[237] It is difficult to conceptualize that an individual without a disability could ultimately file a reverse-ADA suit because it does not further the ADA's purpose. How is an individual without a disability capable of relying on the ADA to buttress his argument that an employer discriminated against her because she did

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233. Schwartz, *supra* note 6, at 658.

234. Schwartz, *supra* note 174, at 1776.

235. 29 U.S.C. § 621 (2004); Wirtz, *supra* note 1.

236. *See* Hamilton v. Caterpillar Inc., 966 F.2d 1226, 1228. (7th Cir. 1992). The Seventh Circuit comparing ADEA to ADA in light of reverse discrimination claims stated:

> There is no evidence in the legislative history that Congress had any concern for the plight of workers arbitrarily denied opportunities and benefits because they are too *young*. Age discrimination is thus somewhat like handicap discrimination: Congress was concerned that older people were being cast aside on the basis of inaccurate stereotypes about their abilities. The young, like the nonhandicapped, cannot argue that they are similarly victimized.

237. H.R. Rep. No. 101-485, pt. 2, at 22 (1990).

not have a disability? An individual without a disability who attempts to rely upon the ADA as a cause of action for discriminatory treatment will inevitably defeat the purpose for which the statute was enacted. Congress had no intention of offering aid to persons *without* disabilities by enacting the ADA.[238] Rather, Congress hoped to level the playing field for those with disabilities to help them gain access to areas in which they have historically been ostracized from or incapable of entering, such as the employment setting, buildings, and society in general.[239] The absurdity demonstrated by a reverse ADA suit clarifies the need to apply the protected class theory of discrimination to those cases in which the protected class consists of a broad class of persons.[240]

VI. CONCLUSION

Over the past thirty years, the Supreme Court has been forced to take a good, long, hard look at age discrimination within the work environment. Within employment discrimination jurisprudence, the Supreme Court has recognized the differences between age which is covered by the ADEA, and other characteristics, such as race and gender, which are encompassed by Title VII. The Supreme Court has continuously noted that despite their similar roots, discriminatory principles and theories applicable to Title VII are not transplantable to ADEA cases. With age discrimination, the Supreme Court has been faced with particularly unique challenges. For instance, the Supreme Court encountered its first hurdle in *Hazen* in which it had to determine what age discrimination is, as opposed to what it is not. And more recently in *General Dynamics*, the Supreme Court had to determine whether reverse discrimination claims applicable to Title VII, are also applicable to the ADEA. Ultimately, the Court, relying on a protected class or antisubordination theoretical analysis, held that reverse age discrimination claims cannot be substantiated under the ADEA.

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238. 42 U.S.C. § 12101 (2004).

239. Miranda Oshige Mcgowan, *Reconsidering the Americans With Disabilities Act*, 35 Ga. L. Rev. 27, 40 (2000).

240. The following reverse-ADA case ranked number one on Gerald D. Skoning's, *2000 Ten Wackiest Employment Lawsuits*, Nat'l L.J., Apr. 2001, at A21. In *Woods v. Phoenix Society of Cuyahoga County*, 10 A.D. Cases 1086 (Ohio Ct. App. 2000), the plaintiff, an employee at a non-profit organization, filed suit against his employer for reverse discrimination under the ADA. The plaintiff alleged that he was terminated from his position because he, unlike all of his co-workers, had *no* prior mental health problem. Plaintiff alleged that when the director of Phoenix became aware of his lack of mental handicap or disability, he began treating plaintiff in a hostile manner. The Ohio Court of Appeals for the Eighth Circuit held that plaintiff's reverse discrimination claim had merit because he was discriminated against because he was a member of the majority, unlike his co-workers who were members of the minority class (persons with disabilities). *Id.*

It has been suggested that the protected class theory of discrimination is the "conscience of Title VII claims;" however, as has been discussed, the reasoning utilized by most courts is that of formal equality.[241] Formal equality theory allows courts to rely on the strict textual interpretations of discrimination arising under Title VII.[242] Since courts have traditionally, indiscriminately applied the same reasoning used in Title VII cases to those arising under the ADEA, the Supreme Court's reversal of the Sixth Circuit's decision in *General Dynamics* is monumental. The Supreme Court's decision in *General Dynamics* dispels any suggestion that pending and future ADEA claims will be resolved under anything but the protected class theory.[243]

Because of the expected increase in the number of age discrimination claims to be filed in the near future, courts will need to embrace the protected class theory as the appropriate theory to utilize in settling ADEA claims. The use of the protected class theory of discrimination will ensure that the purpose and objective of the ADEA is being maintained and utilized in the appropriate manner. Had the Supreme Court affirmed the Sixth Circuit and its endorsement of the formal equality theory, the ADEA would have inevitably lost all of its credibility as a reliable means of protecting older employees from age discrimination within the workplace. Overall, the Supreme Court's decision to reverse the Sixth Circuit Court of Appeals' decision in *General Dynamics*, by relying upon the protected class theory of analysis, will inevitably preserve the purpose of the ADEA and protect those for whom the ADEA was originally enacted.

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241. Schwartz, *supra* note 174, at 1777-79; *see* Brake, *supra* note 213, at 25; Corbett, *supra* note 182, at 141-42 (discussing the fact that formal equality is the dominant theory in discrimination case law).

242. Schwartz, *supra* note 174, at 1778.

243. There are some Title VII cases in which the courts have applied the protected class theory of discrimination. *See* Mower v. Westfall, 177 F. Supp.2d 940 (S.D. Iowa 2001) (looking to Congressional purpose of Title VII in reverse race discrimination claim); Oiler v. Winn-Dixie Louisiana, Inc., 2002 WL 31098541 (E.D. La. 2002) (relying on Congressional purpose of Title VII to decline extending Title VII sex discrimination protection to a transgendered cross-dresser).

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I would like to express my thanks to my husband Walt, for his patience, support, and understanding, not only while I was working on this paper, but throughout my entire law school career. I would also like to thank Professor William Corbett for providing me with such a challenging topic and offering me invaluable insight and encouragement throughout the writing process.